Supreme Court, U.S.
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Nos. 01-139 and 01-168

IN THE

Supreme Court of the United States

LEE ALEXANDER MAGNESS,

Petitioner,

-and-

NINA SCHRODER MAGNESS and
AGNES SCHRODER ATKINS,

Petitioners,

v.

RUSSIAN FEDERATION, RUSSIAN MINISTRY OF CULTURE, and RUSSIAN STATE DIAMOND FUND,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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H.R. Rep. No. 94-1487 (1976) 11, 15

The United States Court of Appeals for the Fifth Circuit held in this case[1] that service on foreign states and their political subdivisions has to comply strictly with the requirements of the Foreign Sovereign Immunities Act,[2] specifically 28 U.S.C. § 1608(a).[3] The appeals court also held that service on those states' agencies and instrumentalities – under 28 U.S.C. § 1608(b) – may, in limited circumstances not present in this case, substantially comply with the FSIA.[4] The court then vacated the decision of the United States District Court for the Southern District of Texas which had denied a motion to vacate a $234 million default judgment.[5] The appeals court found that the district court had erred in denying the motion because plaintiffs (petitioners here) had utterly failed in all respects to serve process as required by the FSIA.[6] Instead of dismissing the case, however, the appeals court remanded it to the district court with instructions that the court still allow "a reasonable time to perfect service."[7] Petitioners were given yet another opportunity to effect proper service and, thereafter, proceed with litigating their case. There is nothing legally remarkable about the appeals court's decision, and there are no compelling reasons to bring the matter now before this Court. Therefore, respondents the Russian Federation, the Russian Ministry of Culture, and the Russian State Diamond Fund

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1. *Magness v. Russian Federation*, 247 F.3d 609, 611 (5th Cir. 2001) (included in the appendices (cited hereinafter jointly as "A-#") (at A-1 to A-17) to the petitions for writ of certiorari); A-2.

2. Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611.

3. Section 1608 is included at A-42 to A-44. Subsection (a) establishes the requirements for service of process on foreign states and their political subdivisions.

4. 247 F.3d at 616; A-11.

5. *Id.* at 619; A-17.

6. *Id.* at 619; A-16.

7. *Id.* at 619; A-17.

respectfully request that the Court deny the petitions for writ of certiorari.[8]

STATEMENT OF THE CASE[9]

Although petitioners have never clearly identified or defined the terms of the Russian law which they allege generated this dispute, they have throughout asserted[10] without documentation that a law was enacted in Russia in 1994 entitling them, as descendants of Russians whose property was expropriated during the Bolshevik Revolution, to buy or reclaim their ancestors' expropriated property.[11] Petitioners assert that they traveled to Russia and established that they were the rightful owners of approximately $234 million worth of real estate and other properties.[12] Petitioners have further asserted without documentation that the Russian Federation refused to return this property to them and, thereby, expropriated it again.[13]

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8. Lee Alexander Magness filed his petition *pro se* (no. 01-139); Nina Schroder Magness and Agnes Schroder Atkins filed, through counsel, a separate petition (no. 01-168). Both petitions are treated jointly in this brief in opposition.

9. Petitioners failed to provide a "statement of the case setting out the facts material to consideration of the questions presented," as required by Sup. Ct. R. 14(1)(g). In its absence, respondents supply the following statement. Citations are to the record before the appeals court.

10. R. at 11; 11/20/98 Default Hearing Tr. at 14-15, 21-22.

11. Without regard to the requirements of Fed. R. Civ. P. 44(a)(2) or 44.1 (which govern the authentication and determination of foreign law), petitioners provided the district court an untranslated Executive Order by the Mayor of St. Petersburg governing registration of enterprises with foreign investments. (*See* 11/6/98 Show Cause Hearing Tr., Exh. 28.) This law, by its terms, has no relevance to the alleged national policy for repatriation of property or goods seized by the Bolsheviks.

12. R. at 11, Default Hearing 15-17, 27-32.

13. R. at 9-11; 11/20/98 Default Hearing Tr. at 12, 17-18, 20-21.

In 1997, the American-Russian Cultural Cooperation Foundation sponsored a touring exhibition of art and cultural objects from the Russian Federation known as the "Jewels of the Romanovs/Treasures of Russia."[14] This exhibit traveled to the Museum of Fine Arts in Houston, Texas.[15] On July 24, 1997, a few days before the exhibit was scheduled to depart, petitioners filed a Complaint against four defendants – the Russian Federation, the Russian Ministry of Culture, the Russian State Diamond Fund,[16] and the Foundation sponsoring the exhibit – contending that the Russian government had expropriated their property without paying just compensation.[17] Among other relief, petitioners sought a temporary restraining order ("TRO") barring the removal of the Romanov jewels from the court's jurisdiction because the jewels could satisfy any judgment petitioners might secure.[18]

On July 25, 1997, one day after the Complaint was filed, the court held a hearing to address petitioners' motion for a TRO.[19] The Russian Federation learned of petitioners' attempts to seize the Romanov jewels from the Foundation, and secured counsel to prevent petitioners from disrupting the exhibit.[20] The court denied their motion.[21]

One year later, petitioners had yet to attempt to serve any of the defendants.[22] As a result, the district court ordered

14. R. at 10, 162.

15. *Id.*

16. The State Diamond Fund is an agency or instrumentality of the Russian Federation created by Czar Peter I in 1719 to house Russia's collection of jewels and precious stones.

17. R. at 1-15.

18. R. at 5-8.

19. R. at 16-17.

20. R. 346-47; 7/25/97 TRO Hearing Tr. at 1-39.

21. R. at 18-19.

22. R. at 24.

petitioners to effect service before September 1, 1998, and to provide proof of such service to the court.[23] The Rule of Civil Procedure governing service (Rule 4) was cited in the court's order.[24]

Despite the explicit requirements of § 1608, on August 31, 1998 (the very last possible day on which they could effect service as required by the court), petitioners purported to effect service on the Russian Federation in their own way by forwarding a copy of the Summons and Complaint to: (1) the Secretary of State of Texas with instructions to serve the Russian Federation, c/o Boris Yeltsin;[25] (2) defense counsel;[26] and (3) the Director of Special Consular Affairs at the U.S. State Department, with instructions to serve the Russian Federation.[27]

Also on August 31, 1998, petitioners purported to serve the Russian Ministry of Culture, the State Diamond Fund, and the Foundation by forwarding a copy of the Summons and Complaint to: (1) the Secretary of State of Texas with instructions to serve the Ministry of Culture and the State Diamond Fund;[28] (2) the Director of Special Consular Affairs at the U.S. State Department with instructions to serve the Ministry of Culture, the State Diamond Fund, and the Foundation;[29] and (3) the Foundation's Chairman.[30]

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23. *Id.*

24. *Id.* (Fed. R. Civ. P. 4 refers to the precise section of the FSIA (28 U.S.C. § 1608) governing "service upon a foreign state or a political subdivision, agency, or instrumentality thereof." *See* Fed. R. Civ. P. 4(j)(1).)

25. R. at 27, 32-33.

26. R. at 30, 35-36.

27. R. at 28, 31.

28. R. at 27, 32-33.

29. R. at 28, 31.

30. R. at 29, 34.

Petitioners' counsel was repeatedly advised of the serious deficiencies in the methodology petitioners had pursued. On September 1, 1998, immediately after attempted service, the once counsel for the Russian Federation informed petitioners' counsel he could not accept service of process for the Russian Federation because he no longer represented the Russian Federation or any other defendant as he had only been retained to represent the Russian Federation at the TRO hearing.[31] Indeed, no defense counsel ever entered an appearance in the case.[32] On November 13, 1998, the State Department informed petitioners' counsel that it could not undertake service because of numerous procedural irregularities with petitioners' submission.[33] Petitioners ignored these warnings and continued to serve the State Department and the no-longer counsel for the Russian Federation (both of whom repeatedly informed petitioners' counsel that service could not be effected through them).[34] Service of the Complaint, as the appeals court eventually found, was never perfected.

On November 19, 1998, petitioners filed their Motion for Default Judgment.[35] The very next day, the court held a hearing on the motion.[36] Defendants were not notified and, therefore, did not appear. Petitioners submitted at the hearing copies of Federal Express receipts, facsimile confirmation sheets, and cover letters showing the above described methods of service.[37] However, neither petitioners nor their counsel informed the court they had been instructed by the State Department and former Russian Federation counsel that service was ineffective, nor

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31. R. at 346.

32. *See* District Court Docket Sheet.

33. R. at 469.

34. R. at 317, 346, 488-491, 479-481, 473, 471.

35. R. at 50-57.

36. R. at 60.

37. 11/20/98 Default Hearing Tr. at 5-6, Ex. 1-6.

did petitioners' counsel introduce the letters written by the State Department stating service was ineffective.[38] Relying on petitioners' uncontradicted representations, the court found that defendants had been served and entered a default judgment.[39] On February 26, 1999, petitioners submitted proposed Findings of Fact and Conclusions of Law.[40] The court approved them on June 8, 1999.[41] That day the court also entered final judgment against all defendants for approximately $234 million plus interest.[42]

On June 15, 1999, the State Department received a request from petitioners' counsel to serve the final judgment on defendants.[43] On June 22, 1999, the State Department again wrote petitioners' counsel advising him that it could not comply with his request to forward the judgment because petitioners had not properly served the Summons, Complaint, and a Notice of Suit through diplomatic channels.[44] Service of the final judgment was never perfected.

On June 23, 1999, the Foundation filed a motion to vacate the final judgment against it.[45] The State Department filed an affidavit notifying the district court that the State Department did not serve any of the defendants with the Complaint or the Default Judgment as petitioners' counsel had requested, and explained the specific procedural irregularities with petitioners' attempted service.[46] On August 18, 1999, the court granted the

38. *Id.*

39. R. at 61.

40. R. at 69-80.

41. R. at 84-97; A-18 to A-29.

42. R. at 98-99.

43. R. at 301, 317.

44. R. at 307-09, 317.

45. R. at 177-90.

46. R. at 218-321.

Foundation's motion.[47] Subsequently, petitioners agreed to dismiss with prejudice their claims against the Foundation.[48]

On or about August 26, 1999, Yuri V. Ushakov, Russian Federation Ambassador to the United States, who had been appointed earlier in 1999, first learned of petitioners' case and the entry of default judgment.[49] Thereafter, undersigned counsel was retained to attempt to vacate the default judgment against the remaining defendants (respondents here), the Russian Federation, the Russian Ministry of Culture, and the Russian State Diamond Fund.[50]

On October 14, 1999, respondents filed with the district court a motion to vacate the default judgment under Fed. R. Civ. P. 60 arguing that the default judgment was void because the district court lacked personal jurisdiction in the absence of proper service of process under the FSIA.[51] On January 12, 2000, the district court denied[52] the motion concluding that while petitioners did not strictly comply with the FSIA, their attempted service was sufficient because it provided respondents notice and, thus, amounted to substantial compliance.[53]

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47. R. at 333-336.

48. R. at 337-338.

49. R. at 515-516.

50. R. at 515.

51. R. at 340-42, 518-532.

52. R. at 714-721; A-30 to A-36.

53. After the motion to vacate was denied, petitioners attempted to execute on the judgment by seizing property which was part of the "Nicholas and Alexandra" exhibit located at the time at the Mobile Alabama Civic Center. *See Magness v. Russian Federation*, 84 F. Supp. 2d 1357 (S.D. Ala. 2000), *amended by*, 2000 U.S. Dist. LEXIS 1278 (S.D. Ala. Feb. 7, 2000) (included at A-37 to A-41). Respondents successfully defeated this attempt. *Id.* Thereafter, respondents filed a motion to stay execution of the judgment pending appeal. (R. at 728-777.) The motion was granted on April 28, 2000. *See* District Court Docket Sheet.

On February 16, 2000, the Russian Federation, the Russian Ministry of Culture, and the Russian State Diamond Fund filed their notice of appeal with the Fifth Circuit Court of Appeals.[54] Thereafter, the United States Government appeared as *amicus curiae* in their support.[55] Oral argument was held on December 4, 2000.[56] On April 24, 2001, the appeals court vacated and remanded the case to the district court.[57]

THE APPEALS COURT'S DECISION

The United States Court of Appeals for the Fifth Circuit arrived at its decision unanimously.[58] The court carefully considered and addressed each and every argument presented, and rendered a fair and just decision under the facts and applicable law. The court gave petitioners yet another opportunity to effect service. Considering the circumstances, the court was more than generous to petitioners.[59]

Methodically, the court reviewed the express language of § 1608, and considered the available legislative history of the FSIA and the relevant caselaw. The court concluded correctly

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54. R. at 724-725.

55. *See* Brief for the United States as *Amicus Curiae* Supporting Appellants.

56. *See* Appeals Court Docket Sheet.

57. *Magness*, 247 F.3d at 609; A-17.

58. The panel consisted of Circuit Judges E. Grady Jolly and W. Eugene Davis, and U.S. Court of International Trade Judge Jane A. Restani who was sitting by designation.

59. The circumstances included petitioners' willful failure to disclose to the district court, prior to the court's entry of default judgment, that the State Department had advised them their attempts at service were ineffective. Petitioners' failure to disclose this vital information, respondents maintained before the district and appeals courts, amounted to fraud, misrepresentation, and misconduct also necessitating vacation of the judgment under Fed. R. Civ. P. 60(b)(3).

that the provisions for service under section 1608(a) are "hierarchical, such that a plaintiff must attempt the methods of service in the order they are laid out in the statute."[60] Thus, for service on the Russian Federation and the Russian Ministry of Culture, service should have first been done "in accordance with any special arrangement" between the parties.[61] Absent that (as here), the statute requires service "in accordance with an applicable international convention."[62] "Given that there was no special arrangement or international convention governing service here," the appeals court indicated that petitioners were "required to have attempted service on the head of the Russian Ministry of Foreign Affairs" in accordance with FSIA § 1608(a)(3).[63] Only if and when that proved impossible were petitioners allowed to seek State Department assistance.[64]

But, as the appeals court recognized, petitioners did not do this. Here, "[i]nstead of asking the clerk of the district court to send the summons and notice of suit by return receipt mail to the head of the Russian foreign ministry under section 1608(a)(3)," petitioners "sent their complaint to the Texas Secretary of State for forwarding to Boris Yeltsin [then Russia's President], and sent the complaint *directly* to the Russian Deputy Minister of Culture."[65] This, the court concluded, did not comply in any way with the service requirements of the FSIA.[66]

On the other hand, service under § 1608(b) for the Russian State Diamond Fund must also be done in hierarchical order. "A plaintiff must first attempt service in accordance with any

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60. *Magness*, 247 F.3d at 613; A-6.

61. 28 U.S.C. § 1608(a)(1).

62. *Id.* at § 1608(a)(2).

63. *Magness*, 247 F.3d at 613; A-6.

64. *See* 28 U.S.C. § 1608(a)(4).

65. *Magness*, 247 F.3d at 613; A-7.

66. *Id.*

special arrangement between the parties."[67] If none exists, and here there was none, petitioners had to consider service "through an authorized agent in the United States or according to an applicable international convention."[68] As there was none of either here, petitioners should have served through a letter rogatory, the court's clerk, or as otherwise directed by the court.[69]

But again, this is not what petitioners did. "[I]nstead of following the statute," petitioners forwarded a copy of their papers to the State Department and the Texas Secretary of State for service upon the [Russian State Diamond] Fund."[70] This, the court similarly concluded, did not comply in any way with the service requirements of the FSIA.[71]

The question then became for the court whether anything could excuse anything short of strict compliance with the law's requirements. The court held that "service that gives actual notice of the suit and the consequences thereof to the proper individuals within the agency or instrumentality" could provide such an excuse under FSIA § 1608(b).[72] However, nothing short of strict compliance would do for service on a foreign state or its political subdivisions.[73]

Turning then to the question whether petitioners substantially complied with the provisions of § 1608(b) as to the Russian State Diamond Fund, the court concluded that they had not for two reasons.[74] First, there was no evidence

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67. *Magness*, 247 F.3d at 614; A-8; 28 U.S.C. § 1608(b)(1).

68. *Magness*, 247 F.3d at 614; A-8; 28 U.S.C. § 1608(b)(2).

69. 28 U.S.C. § 1608(b)(3).

70. *Magness*, 247 F.3d at 614; A-8.

71. *Id.*

72. *Id.* at 616; A-11.

73. *Id.* at 616; A-11.

74. *Id.*

whatsoever that petitioners included a Notice of Suit in the service documents they allegedly served. As the appeals court explained: "The notice of suit is an integral part of the service requirements upon foreign states, and is 'designed to provide a foreign state with an introductory explanation of the lawsuit, together with an explanation of the legal significance of the summons, complaint, and service.' "[75] Secondly, and more "importantly, there is no evidence to establish that the defendants had actual notice of the suit."[76] Here, petitioners bore the burden of proving that respondents had actual notice.[77] The court concluded that "[b]ecause the plaintiffs have not established that they provided the Russian State Diamond Fund actual notice of the suit, substantial compliance with section 1608(b) was lacking."[78]

Having determined that petitioners had failed to perfect service under § 1608, the court then considered the district court's denial of respondents' motion to vacate the default judgment.[79] Applying the Fifth Circuit's previously identified standards applicable to consideration of Fed. R. Civ. P. 60(b) motions,[80] the court held that the district court had indeed committed reversible error. The appeals court then vacated the district court's judgment, and remanded the case for further proceedings not inconsistent with its opinion.[81]

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75. *Id.* at 618, *quoting*, H.R. Rep. No. 94-1487, at 12 (1976); A-15.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *See Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981).

81. *Magness*, 247 F.3d at 619; A-17.

REASONS FOR DENYING THE WRIT

The Court should deny the petitions for writ of certiorari for the following reasons: (A) petitioners' questions were not presented below and/or are unsupported by the record; (B) this case does not present any genuine and substantial questions of constitutional or federal law; and (C) there is no conflict among the courts of appeals requiring resolution by this Court.

A. Petitioners' Questions Were Not Presented Below and/or Are Unsupported by the Record.

The petitions for writ of certiorari present a total of four questions which were not presented to the courts below and/or are wholly unsupported by the record. As such, the Court should deny them.

Petitioner Lee Alexander Magness would have this Court decide two questions. His first is: "In attempting to serve a corrupt foreign sovereign, does 'strict compliance' with the service of process requirements of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1608[,] deny U.S. citizens access to the U.S. judicial system and due process."[82] This is the first time this question is being presented in this case. Leaving aside the totally unsupportable, unwarranted, and purposefully offensive nature of the question, the fact is that petitioners nowhere below attempted to make a record that would have supported such a finding and that any such condition should have excused their compliance with the requirements of the FSIA. Neither have petitioners ever alleged or established that, by requiring strict compliance with the FSIA requirements for service of process on foreign states and their political subdivisions, petitioners are somehow being denied access to the courts or due process.

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82. Petition no. 01-139, at i.

Petitioner Lee Alexander Magness's second question was also never presented below and lacks any support in the record: "Whether the Executive Branch, State Department and Department of Justice[,] have [sic] the right to make judicial [sic] determinations regarding sovereign immunity and service of process."[83] Taking first the issue of sovereign immunity, there has been no determination (judicial or otherwise) as to sovereign immunity because sovereign immunity is a matter with which the district court has not yet even been presented because of petitioners' own failure to effect proper service of process. Only after proper service will respondents have to file a responsive pleading at which time the issue of sovereign immunity will be briefed and, ultimately, decided. As to service of process, that has in fact remained throughout this litigation a matter for "judicial determination" and is the very crux of the issues which have been presented to the courts in this case. The role the State Department has played is the one established by the FSIA itself in § 1608(a)(4) requiring plaintiffs, if they cannot effect service of process through the other statutorily-specified means, to do so through the State Department. The Justice Department's role, on the other hand, was only as *amicus* to the Fifth Circuit Court of Appeals.

In addition to these questions, petitioners Nina Schroder Magness and Agnes Schroder Atkins present the Court with two questions of their own: (1) "Whether the Magness Plaintiffs, pursuant to the service provisions of the Foreign Sovereign Immunities Act, properly perfected service of process upon the Russian Defendants, where the Defendants received actual notice of the proceedings, and where Plaintiffs substantially, not strictly, complied with the service provisions of the Act;" and (2) "[w]hether a general appearance by a defendant at a TRO hearing, where actual knowledge of the suit is received, waives any defect in service subsequently perfected."[84]

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83. *Id.*

84. Petition no. 01-168, at i.

While these questions have been raised previously in some form, they both explicitly assume that respondents had in fact received actual notice. This is contrary to the record below, and was explicitly rejected by the court of appeals: "there is no evidence to establish that the defendants had actual notice of the suit."[85] Even now petitioners fail to point to anything that would prove otherwise.

If for no other reason, the Court should deny the petitions for writ of certiorari because petitioners failed to present below the questions they now seek to present to this Court and/or because, as framed, the questions are wholly unsupported by the record. The petitions, however, should also be denied for other reasons.

B. This Case Does Not Present any Genuine and Substantial Questions of Constitutional or Federal Law.

In any case, the questions petitioners present do not raise any genuine and substantial issues of constitutional or federal law. Whether a requirement of strict service of process could somehow, in some unlikely and remote circumstance, work a denial of access to the courts or due process; whether the Executive Branch has the right to make "judicial" [sic] determinations regarding sovereign immunity and service of process; whether service of process has been complied with strictly or substantially; and whether a general appearance by counsel at a TRO hearing waives any defect in service of process; these are all manifestly not genuine and substantial enough to require this Court's review.

The appeals court itself left the possibility open that, "under extraordinary circumstances not present in this case," methods other than strict service under FSIA § 1608(a) "might be sufficient."[86] The court, however, "decline[d] to define any such

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85. *Magness*, 247 F.3d at 618; A-15.

86. *Id.* at 616, n.15; A-11 at n.15.

exception until those extraordinary circumstances come before this court."[87]

There also is no question that the Executive Branch, be it through its State or Justice Departments, cannot be involved in "judicial determinations" over sovereign immunity, service of process or, for that matter, anything else. By definition, "judicial determinations" can and should only be made by the Judiciary.[88] And as petitioners rightly point out, by passage of the FSIA, Congress took any decision over sovereign immunity away from the State Department and placed it in the courts.[89] This, however, does not mean Congress cannot delegate to the State Department, or the State Department cannot play, a role in the service of process of foreign governments. No genuine and substantial question exists that Congress and the State

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87. *Id.*

88. U.S. Const. art. III, § 1, cl. 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish"); *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

89. *See, e.g.*, *Kiowa Tribe v. Manufacturing Techs.*, 523 U.S. 751, 759 (1998) ("In 1952, the State Department issued what came to be known as the Tate Letter, announcing the policy of denying immunity for the commercial acts of a foreign nation. . . . Difficulties in implementing the principle led Congress in 1976 to enact the Foreign Sovereign Immunities Act, resulting in more predictable and precise rules."); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 n.1 (1989) ("From the Nation's founding until 1952, foreign states were generally granted . . . complete immunity from suit in United States courts, and the Judicial Branch deferred to the decisions of the Executive Branch on such questions.") (citation omitted); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983) ("In 1976, Congress passed the Foreign Sovereign Immunities Act in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to '(assure) litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.'"), *quoting*, H.R. Rep. No. 94-1487, at 7 (1976).

Department have such authority.[90] It also certainly does not mean that the Justice Department cannot enter an *amicus-curiae* appearance in support of a position taken by a foreign government, as it did before the court of appeals.[91]

There is also no genuine and substantial question that service of process must be complied with.[92] And whether it has or not (as in this case) been done depends upon questions of fact more properly relegated to courts other than this one.[93]

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90. *See, e.g., United States v. Mead Corp.*, __ U.S. __, __, 121 S. Ct. 2164, 2171, 150 L. Ed. 2d 292, 303 (2001) ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

91. *See* Fed. R. App. P. 29(a) ("The United States or its officer or agency . . . may file an amicus-curiae brief without the consent of the parties or leave of court").

92. *See, e.g., Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347 (1999) (referring to the "bedrock principle: An individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process."); *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) ("Before a . . . court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied."); *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-45 (1946) ("Service of summons is the procedure by which a court . . . asserts jurisdiction over the person of the party served.").

93. *See, e.g., NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951) ("This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way."); *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178-79 (1938) ("There is nothing

(Cont'd)

Finally, it has also been well established that waiver under the FSIA occurs "only when the sovereign/state fails to assert immunity in a responsive pleading"[94] and, therefore, that no such waiver can occur from simply appearing at a TRO hearing before proper service was ever attempted much less perfected.

From this it should be clear that petitioners raise here no genuine and substantial issues of constitutional or federal law and that their petitions for writ of certiorari should, therefore, be denied. But their petitions should also be denied for the following reason.

C. There Is No Conflict Among the Courts of Appeals Requiring Resolution by this Court.

Petitioners maintain that there is a conflict in the Circuits over whether the service of process requirements of the FSIA must be complied with strictly or substantially. However, as the Fifth Circuit Court of Appeals explained, there is no conflict among the courts of appeals on what the FSIA requires.

The courts of appeals which have been presented with the issue agree that service on foreign states and their political subdivisions has to comply strictly with FSIA § 1608(a),[95] while

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(Cont'd)
in the lower courts' decision on either of the added questions to warrant review here. Whether respondents . . . are estopped depends on the facts. Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."); *FTC v. American Tobacco Co.*, 274 U.S. 543, 544 (1927) ("Proper decision of the controversy depends upon a question of fact. . . . Accordingly, we adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.").

94. *See, e.g.*, *MCI Telecomm. Corp. v. Alhadhood*, 82 F.3d 658, 661-62 (5th Cir. 1996).

95. *See Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994) ("strict adherence to the terms of 1608(a) is (Cont'd)

service on those states' agencies and instrumentalities has to comply substantially with FSIA § 1608(b).[96]

(Cont'd)
required"); *Gerritsen v. Consulado General de México*, 989 F.2d 340, 345 (9th Cir. 1993) (suggesting plaintiffs must strictly comply with the service provisions on a foreign state under § 1608(a)); *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250, 253 (7th Cir. 1983) (§ 1608(a) "delineates the 'exclusive procedure' for effecting service of process upon a foreign state"); *Magnus Elec., Inc. v. Royal Bank of Canada*, 620 F. Supp. 387, 389 (N.D. Ill. 1985), *aff'd in part, rev'd in part on other grounds*, 830 F.2d 1396 (7th Cir. 1987) ("noncompliance with the [FSIA]'s literal requirements (though it certainly did provide notice) deprives this Court of personal jurisdiction"); *Gray v. Permanent Mission of People's Republic of Congo to United Nations*, 443 F. Supp. 816, 821 (S.D.N.Y.), *aff'd*, 580 F.2d 1044 (2d Cir. 1978) (under § 1608(a) "informal notification through channels clearly outside the obvious requirements of the applicable statute cannot be substituted for those which meet the requirements").

96. *Transaero*, 30 F.3d at 154 ("[t]he authorities generally hold that section 1608(b) may be satisfied by technically faulty service that gives adequate notice to the [defendant]"); *Straub v. Green, Inc.*, 38 F.3d 448, 453 (9th Cir. 1994) (under § 1608(b), "the pivotal factor is whether the defendant receives actual notice and was not prejudiced by the lack of compliance"); *Sherer v. Construcciones Aeronáuticas*, 987 F.2d 1246, 1249 (6th Cir. 1993) (substantial compliance is appropriate test under § 1608(b) where defendant had answered Complaint and raised 21 affirmative defenses); *Harris Corp. v. Nat'l Iranian Radio & Television*, 691 F.2d 1344, 1352 (11th Cir. 1982) (actual notice overrides technical deficiencies in service under § 1608(b)); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 821 (3d Cir. 1981) ("[r]ather than making service on foreign instrumentalities a rigid, technical, or cumbersome procedure, Congress sought to facilitate the ability of private plaintiffs to service foreign entities."); *Obenchain Corp. v. Corporación Nacional de Inversiones*, 656 F. Supp. 435, 437 (W.D. Pa. 1987), *aff'd in part, rev'd in part on other grounds*, 898 F.2d 142 (3d Cir. 1990) ("Service of process [under § 1608(b)] did not comply with the FSIA, but will suffice where actual notice was received.").

While, as recognized by the appeals court, some district courts have held differently,[97] there is no irreconcilable conflict among the courts of appeals. There being no conflict, there is no need for this Court to exercise its supervisory power.[98]

CONCLUSION

The Court should deny the petitions for writ of certiorari.

Respectfully submitted,

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97. *See, e.g.*, *LeDonne v. Gulf Air, Inc.*, 700 F. Supp. 1400 (E.D. Va. 1988) (requiring strict compliance under § 1608(b)); *Lippus v. Dahlgren Mfg. Co.*, 644 F. Supp. 1473, 1479 (E.D.N.Y. 1986) (requiring that certain "exigencies" be present before excusing non-strict compliance with § 1608(b)); *Unidyne Corp. v. Aerolineas Argentinas*, 590 F. Supp. 391, 395 (E.D. Va. 1984) (noting that "this Court is directed to strictly interpret the requirements set forth in § 1608(b)").

98. Sup. Ct. R. 10(a).